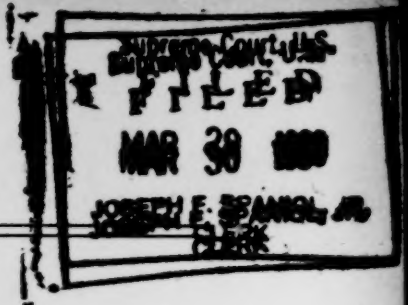


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89-1311

No. 89-1911



In The
SUPREME COURT OF THE UNITED STATES

October Term, 1989

—◆—
S. MASON CARBAUGH, as he is
Commissioner of the Department
of Agriculture and Consumer Services

Petitioner,

v.

TELCO COMMUNICATIONS, INC.

Respondent.

—◆—
**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

—◆—
BRIEF IN OPPOSITION

—◆—
PETER S. BROOKS
Telco Communications, Inc.
21 Industrial Court
Seekonk, MA 02771
508-336-6633

JOHN G. DOUGLASS
Wright, Robinson, McCammom,
Osthimer & Tatum
411 East Franklin Street
Richmond, VA 23219
804-783-1100

*LOUIS J. SCERRA, JR.
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265 Franklin Street
Boston, MA 02110
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*Counsel of Record

BEST AVAILABLE COPY

26 pp

QUESTION PRESENTED

Where a state agency has commenced an investigation and has held one informal meeting with a party, but has not commenced a formal administrative proceeding, should a federal court abstain from exercising jurisdiction in a suit by the target of that investigation?

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STATEMENT OF THE CASE

Telco is a Rhode Island corporation engaged in the business of providing professional fund raising services to civic organizations and labor unions for a fee. Telco publishes a series of handbooks relating to public health and safety and arranges for the sale of advertising to be included in these handbooks. The proceeds from the sale of advertising are divided among Telco, its sales representatives, and Telco's clients.

In March of 1988, Telco was advised by the Office of Consumer Affairs of the Commonwealth of Virginia ("OCA") of an investigation of its fund raising activities in Virginia. Specifically, the OCA advised Telco that it appeared that Telco had failed to disclose to potential advertisers the percentage of the gross receipts to be paid to the organizations for whom Telco was selling advertising, in violation of Virginia Code Section 57-55.1. (R.App.7)¹ In response, Telco's counsel requested a meeting with the OCA to discuss the issues raised by its letter and the enforceability of the disclosure requirement. (R.App. 4-5).

In addition to charging Telco with failing to disclose the division of the advertising revenues, the OCA also charged Telco with failing to submit accurate scripts of the sales presentations made by its sales representatives. The OCA claimed to have evidence that sales representatives made statements to potential advertisers that were at variance with the scripts of the presentations that Telco was required to and did submit to the OCA (App.11-15). After several further requests by Telco for a meeting to discuss the charges of the OCA, the OCA finally agreed to such a meeting in June of 1988. An informal conference was held in early July of 1988 to discuss the charges by the OCA and Telco and the OCA stipulated that the meeting was to be "settlement negotiations" and the parties agreed that any statements made could not be used as evidence or admissions. (R.App. 8). No settlement of the dispute was accomplished and Telco thereafter filed suit in the federal court.

¹ Reference is to the appendix of the Respondent set forth herein. Respondent shall refer to the appendix contained in the Petition as "App".

Telco challenged four provisions of the charitable solicitation law under the First and Fourteenth Amendments to the United States Constitution. First, Telco claimed that Section 57-55.1 of the Virginia Code, which requires the disclosure of the percentage of the gross revenue to be remitted to a charitable or civic organization, was unconstitutional under the First Amendment. Second, Telco challenged Section 57-55.2(iii), which requires a paid solicitor to disclose the availability of a financial statement to each contributor. Third, Telco challenged the requirement that it submit the text of its oral solicitation to the OCA. Finally, Telco challenged the right of the Commonwealth of Virginia to suspend or revoke a paid solicitor's license.

The OCA took no administrative action after the meeting in July and after Telco filed suit. The OCA simply chose not to commence an administrative action, but rather to await the outcome of the litigation. (R.App. 10-12) The OCA did not even pursue an administrative action for the alleged violations of the Virginia Code that were not challenged by Telco in the federal court.²

The petition of the OCA to this Court completely fails to disclose that the District Court below invited the OCA to commence an administrative action and the OCA declined the invitation. The District Court below issued an order directing the OCA to state, within fifteen days, "whether the Office of Consumer Affairs has initiated a formal hearing under the Virginia Administrative Process Act...for the revocation or suspension of plaintiff's registration" (R.App. 9) In response, the OCA admitted that no administrative action had been taken since the filing of Telco's complaint and that it had no plans to commence such action. (R.App.10-12) The District Court then denied the OCA's motion, holding that there was no pending administrative proceeding to which it could or should defer. (App. 19-26)

² Telco was charged with failing to identify itself and failing to state that it was a paid solicitor. A Telco solicitor was also charged with falsely stating that he was a volunteer and Telco was cited for failing to timely file a financial statement. The constitutionality of these provisions of the Virginia Code allegedly violated by Telco was not challenged by Telco.

The District Court granted Telco's motion for summary judgment and declared each of the four challenged provisions to be unconstitutional under the First Amendment. The Court of Appeals for the Fourth Circuit affirmed the decision of the District Court in part and reversed in part. The Court of Appeals ruled that the District Court correctly declined to abstain and correctly determined the script requirement to be unconstitutional. However, the Court of Appeals held Telco's challenge to Section 57-55.1 to be moot and its challenge to the license revocation provisions to be non-justiciable. The Court of Appeals reversed the decision of the District Court as to the constitutionality of Virginia Code Section 57-55.2 (iii). The Commonwealth sought rehearing and rehearing *in banc* with respect to the Court of Appeals' decision that abstention was not required. The motion for rehearing and for rehearing *in banc* was denied.

In affirming the District Court's denial of the OCA's motion to dismiss on the ground of abstention, the Court of Appeals correctly noted that there was no ongoing state proceeding disrupted by Telco's suit. (App. 32) The "informal fact finding conference" held by the OCA on July 6, 1988 did not constitute the commencement of a state administrative proceeding, according to the Court of Appeals, because there was no further proceeding that necessarily follows from that informal conference. The Court of Appeals also noted that nearly four months had passed from the initial notice of investigation from the OCA until the first settlement conference and there was no provision under the Administrative Process Act to ensure that Telco's constitutional challenge could be promptly adjudicated through the administrative process. (App.32) Thus, Telco was faced with a continuing infringement of its First Amendment rights by the OCA yet was provided with no forum in which to contest the administrative charges except by proceeding with an action in federal court.

The Court of Appeals also noted that the informal fact finding provisions of the Virginia Administrative Code are not sufficiently "judicial in nature" so as to invoke the principles of *Younger* abstention. Specifically, the Court of Appeals noted that the participants were not sworn, nor was a record maintained of the proceeding. There was no opportunity to examine or cross-examine witnesses: "[t]he meeting was simply a settlement conference to see if the dispute could

be consensually resolved." (App.32) As a result, the Court of Appeals concluded that the administrative process had not reached the level where *Younger* abstention required a federal court to abstain.

SUMMARY OF ARGUMENT

The petition for certiorari should be denied because the decision of the Court of Appeals is consistent with the prior decisions of this Court and other decisions of the courts of appeals. The principle of abstention enunciated in *Younger v. Harris* and its progeny only applies when there is an ongoing state proceeding that is judicial in nature and the commencement of suit in the federal court disrupts that ongoing state proceeding. In the instant case, the OCA had only commenced an investigation and held one, "off the record", settlement conference at the time Telco filed suit in the federal court. Nothing further was scheduled to occur and the informal fact finding under Virginia Code Section 9-6.14:11 had been concluded. Moreover, there was no pending state proceeding that was "judicial in nature" that would warrant federal court deference. There was no opportunity to subpoena and examine or cross-examine witnesses. No record of the settlement conference was maintained. The participants were not sworn and there was no neutral arbitrator to hear and resolve the dispute. The action of the OCA simply never advanced beyond a preliminary investigation and *Younger* does not require abstention in deference to a mere investigation by a state agency. (pp.5-8)

The OCA completely ignores the fact that it could have proceeded with an administrative action against Telco after suit was filed and then moved for abstention. Indeed, the District Court invited the OCA to proceed with a formal administrative complaint against Telco but the OCA refused. Accordingly, the suit by Telco did not disrupt or interfere with any pending state administrative proceeding because the OCA could have proceeded with the commencement of a formal action against Telco but failed to do so. (p.9)

ARGUMENT

I. No Administrative Action Was Pending That Warranted Abstention.

The OCA asserts that the July meeting with Telco constituted the commencement of a proceeding under the Administrative Process Act. The OCA further contends that Telco's suit disrupted that state proceeding and, consequently, the District Court and the Court of Appeals erred in refusing to abstain. The OCA concludes that the decisions of the District Court and the Court of Appeals conflict with the decision of this Court in *Younger v. Harris* and should be reviewed by this Court.

The fundamental flaw with the position of the OCA is that no administrative proceeding was pending at the time Telco filed suit in the federal court that would require abstention under *Younger v. Harris*, 401 U.S. 37 (1971). In *Younger*, this Court, based on the principles of comity and federalism, held that injunctive relief in the federal court is not normally available to halt a state criminal prosecution. Two years later, however, in *Steffel v. Thompson*, 415 U.S. 452 (1974), this Court emphasized that "the relevant principles of equity, comity and federalism have little force in the absence of a pending state proceeding." *Id.* at 462, quoting *Lake Carriers Association v. MacMullan*, 406 U.S. 498, 509 (1972). "Federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied." *Steffel v. Thompson, supra*, 415 U.S. at 475. Notions of federalism are simply inapposite where no interruption of or intervention in an ongoing state proceeding by a federal court occurs.

No action was pending before the OCA or any other agency or court of the Commonwealth of Virginia at the time the complaint was filed or at anytime thereafter. Even if one accepts the OCA's characterization of the July settlement conference as "informal fact finding" under Virginia Code Section 9-6.14:11, that conference was concluded. Nothing further was ever commenced. The OCA has not

cited a single decision of this Court or any other court where abstention has been held appropriate in deference to a mere state investigation and *potential* future administrative action.

Even where a state proceeding is pending it is only those state proceedings that are "judicial in nature" that are "of a character to warrant federal court deference." *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 433-34 (1982). The meeting between the OCA and Telco hardly amounted to a judicial proceeding. The only participants were Telco, the OCA, and their respective counsel. No record was maintained of the proceeding, nor were any of the participants sworn. There was no opportunity to subpoena and examine and cross-examine witnesses. The meeting was nothing more than a settlement conference to determine if the dispute could be resolved and falls far short of the requirement that the administrative proceeding be "judicial in nature" to warrant abstention.

The recent decisions of this Court finding abstention to be appropriate all involved cases where a federal plaintiff was faced with a formal administrative proceeding at the time suit was commenced in the federal court. For example, in *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986), a complaint had been filed with the Civil Rights Commission. The Commission had completed its investigation of that complaint and made a determination of probable cause to find that discrimination had occurred. Thereafter, the commission filed a complaint initiating formal administrative proceedings. It was at that stage of the administrative process that the subject of the administrative complaint brought suit in the federal court.

Similarly, in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982) an attorney, prior to the commencement of the federal court action, had received a formal statement of charges from the Ethics Committee and was required to file an answer to those charges within ten days. The statement of charges followed from an investigation and a report and recommendation to the District Ethics Committee. It was clear that, at the time the suit was commenced, a proceeding that was judicial in nature was pending.

The requirement that a judicial proceeding be pending before abstention is required is premised not only on principles of comity and federalism, but also on the theory that, once such a proceeding has been commenced, it is likely that there will be a prompt determination of the issues. As the Court of Appeals stated in *Wulp v. Corcoran*, 454 F.2d 826, 831 (1st Cir. 1972):

Once the state has initiated its processes, it can be expected in the great majority of cases to press the matter with some expedition. When no prosecution is pending, there is no guarantee that prosecution and a chance for ultimate vindication of constitutional claims will quickly follow on the heels of a violation of the state's statute.

If a court were to defer to a mere investigation by a state agency, parties who claim that the state's actions violated important constitutional rights would have no assurance that their claim would be promptly adjudicated through the administrative or state proceeding. In the matter *sub judice*, four months had passed from the beginning of the state's investigation until the time suit was filed and no administrative proceeding had been commenced. There was certainly no assurance to Telco that its constitutional claims would be promptly determined through the state administrative process and any subsequent judicial review.

The OCA's position that abstention is required whenever a state agency commences an investigation would result in the untenable conclusion that state agencies could never be sued in federal court for an adjudication of the constitutionality of their actions. A party claiming to be deprived of its civil rights is not entitled to relief in a federal court unless there has been an actual threat of enforcement of an unconstitutional statute. *See, e.g. Steffel v. Thompson*, 415 U.S. 452 (1974). But, according to the OCA, once that threat of enforcement is made, an administrative proceeding is then pending and a federal court must abstain from exercising its jurisdiction. Thus, a plaintiff claiming to be aggrieved by a deprivation of its constitutional rights would be barred from the federal courts and relegated to the

state administrative process and state judicial review of that administrative process. This result is contrary to the well accepted rule that "the doctrine of abstention...is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it." *Colorado River Water Conservation v. United States*, 424 U.S. 800, 812 (1976), quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189. See also *City of Houston, Texas v. Hill*, ___ U.S. ___, 107 S.Ct. 2502 (1987); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 (1984).

The District Court and the Court of Appeals in this case correctly balanced the competing interests of a state in the administration of its own judicial proceedings and the interests of a private litigant in access to the federal courts for the prompt adjudication of its constitutional rights. If the District Court had abstained, there would have been no assurance that Telco's rights would have been promptly determined in an administrative proceeding or subsequent state court review. Indeed, under the Virginia Administrative Process Act, the OCA could have waited years before proceeding with a formal administrative complaint against Telco that would have triggered the judicial-like proceeding in which Telco's rights could be determined. The First Amendment rights of Telco and its clients, which both the District Court and the Court of Appeals determined to have been violated by the OCA, would have continued impaired while the OCA considered proceeding with an administrative action against Telco. Under these circumstances, the District Court and the Court of Appeals correctly determined that there was no pending proceeding to which the federal courts should defer and certainly the decision of the Court of Appeals does not conflict with any prior decision of this Court or another court of appeals.

II. The Action Commenced By Telco Did Not Disrupt Any Administrative Proceeding

The OCA asserts that Telco's suit disrupted their ongoing administrative proceeding. However, the OCA does not explain or substantiate how Telco's suit interfered in any way with any administrative action contemplated by the OCA. No preliminary injunction to restrain an administrative proceeding was requested or issued. The OCA was free to continue its investigation and to proceed with an administrative action to suspend or revoke Telco's license. In fact, the District Court invited the OCA to proceed with an administrative action against Telco and the OCA declined to do so. (R.App. 9-10). When the OCA declined to proceed, neither Telco nor the District Court had any assurance that Telco's constitutional challenge to the charitable solicitation law would be promptly resolved. The OCA should not now be heard to complain that the District Court erred in refusing to abstain where the Court's action was founded on the OCA's own refusal to proceed expeditiously with its administrative process.

It is well established that a federal court may abstain in deference to a *subsequently* commenced administrative proceeding where the federal action is in its early stages and there has been no proceedings of substance on the merits. *Hicks v. Miranda*, 422 U.S. 332, 349 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). Hence, the OCA's fear of a "race to the court house" after informal fact finding has been initiated is completely baseless. Even if the subject of an administrative investigation wins the race to the court house, the Commonwealth may simply proceed with its administrative action and then seek to stay or dismiss the suit based on *Younger*.

Younger and its progeny are founded on the tenet that a federal court should not interfere with a pending proceeding established under state law. If there is no disruption of a state proceeding, the principles of federalism upon which *Younger* and its progeny rely have no application and abstention is inappropriate. In this case, the OCA has simply failed to demonstrate how the suit by Telco disrupted any action taken or contemplated by the OCA and, therefore, both the District Court and the Court of Appeals correctly determined that abstention was not required.

CONCLUSION

For the reasons stated above, the respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully Submitted,

Peter S. Brooks
Telco Communications, Inc.
21 Industrial Court
Seekonk, MA 02771
508-336-6633

John G. Douglass
Wright, Robinson, McCammom,
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411 East Franklin Street
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*Counsel of Record

R.App.1

COMMONWEALTH OF VIRGINIA
Office of the Attorney General
March 24, 1988

VIA CERTIFIED MAIL

Mr. Jeff Springer, Phone Room Manager
Telco Communications
950 S. Sycamore Street, Bldg.D.
Petersburg, VA 23803

RE: F.O.P. #16, Show Date: April 30, 1988

Dear Mr. Springer:

We are in receipt of the Notice of Solicitation from Telco Communications which identifies you as the phone room manager for the above referenced campaign. Please be aware that the Virginia Solicitation of Contribution Law (copy enclosed) contains disclosure and reporting requirements, some of which are detailed below. Specifically:

Section 57-55.1 requires that you disclose to the consumer at the time of solicitation the minimum percentage of any contribution which the charitable or civic organization will receive for its own use.

Section 57-55.2 requires also that each solicitor disclose his or her name; the name of the company which employs them; that they are paid solicitors and further, shall disclose in writing that financial statements (of the sponsor) are available from the Virginia Office of Consumer Affairs.

Section 57-61 (h) states that any change in information shall be filed with this office within seven days.

R.App.2

If the campaign involves the selling of tickets to events and these tickets may be donated for use by a third party, you must comply with Sections 57-61 (e) and 57-61 (g) requiring the following:

For not less than three years, the solicitor shall maintain the name and addresses of contributors donating tickets and the number of tickets donated by each, as well as the names and addresses of all organizations receiving donated tickets for use by others, including the number of tickets received by each organization. (Section 57-61 (e) 2.)

Also, you may not represent that tickets to events may be donated for the use of others unless: 1) commitments have been obtained in writing from persons, charitable or civic organizations stating that they will accept donated tickets and the number of tickets they will accept, and 2) the solicitor has solicited and accepted no more contributions for donated tickets than the number of written ticket commitments it has received from persons, charitable or civic organizations. Once the number of commitments has been fulfilled, the solicitor must begin using a straight sales script.

Please be aware, Mr. Springer, that failure to comply with these and other provisions not outlined in this correspondence may result in the state seeking legal remedies against you individually as well as against your employer. We respectfully suggest that you make your employees and agents aware of these responsibilities and we trust that

R.App.3

you will contact this Office if you should have questions or we may be of service.

Sincerely,

s/

Larry Roberts
Coordinator
Charitable Solicitations Section

Enclosure

R.App.4

GOLDSTEIN & MANELLO
Counsellors at Law
April 28, 1988

Mr. Larry A. Roberts
Coordinator
State Office of Consumer Affairs
Department of Agriculture and
Consumer Services
Post Office Box 1163
Richmond, Virginia 23209

Dear Mr. Roberts:

I have repeatedly requested a meeting with the Office of Consumer Affairs, both in writing and in discussions with Mr. Wright and the Attorney General's office. I was assured several weeks ago that such a meeting would be arranged and that the request for information submitted by your office and by me would be put on hold until that meeting.

At this point, I have still not received any response to my request for a meeting with your office and with the Attorney General's office. Instead, I get a request for further information. We will obviously provide whatever information to which your office is entitled. However, there are substantial issues as to whether or not the laws cited in your letter apply to the activity of my client and issues as to whether the disclosure laws are constitutional. Once those issues are resolved, we will then address your specific request for information from us.

I have previously advised Mr. Wright, as well as representatives from the Attorney General's office, that a refusal to meet and discuss the issues of concern to Telco will leave us with no alternative but to file suit. It is not our desire to take that route, and we firmly believe that a resolution of the pending issues can be accomplished by

R.App.5

negotiation and compromise. However, unless I receive some response to my request for a meeting, I will assume that you wish to have these issues resolved by a court.

Very truly yours,

s/

Peter S. Brooks

PSB/ms

cc Mark D. Hayes

John G. Douglass, Esquire

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA**

TELCO COMMUNICATIONS, INC.,
Plaintiff

v.

S. MASON CARBAUGH, as he is
Commissioner of the Department
of Agriculture and Consumer
Services of the Commonwealth of
Virginia

Defendant

**CIVIL ACTION
NO. 88-0471-R**

AFFIDAVIT OF MARK D. HAYES

Mark D. Hayes, under oath, deposes and says:

1. I am the president of the plaintiff, Telco Communications, Inc., and I am making this affidavit in connection with the motion for summary judgment filed by the defendant. This affidavit is made as to facts of my own personal knowledge.

2. Telco is a publisher of a series of publications relating to public health and safety. For example, Telco publishes a handbook on drug and alcohol awareness, fire prevention, children's safety, and consumer fraud.

3. Telco has contracted with several local police and fire organizations to publish one or more of these books on their behalf. In addition, Telco has arranged for telephone solicitors to be engaged by the local police or fire organizations to solicit advertising to be included in the books. The proceeds of the advertising revenue are divided among Telco, the telephone solicitors, and the local police or fire organization.

4. The funds generated from the advertising that are retained by the police or fire organization have, to date, been used for the general

business purposes of the organization and not for any charitable purpose. In addition, no charitable appeal is used by the telephone solicitors. As a result, the revenues generated for the organization benefit only the members of that organization and not the public at large. However, Telco also engages in fund raising for charitable organizations in other states and intends to do so at some point in time in Virginia. The investigation by the Department and its interpretation of the charitable solicitation laws in Virginia have dissuaded Telco from pursuing such charitable fund raising.

5. In March of 1988, the Department advised Telco that it had received a tape recording of an alleged conversation between a telephone solicitor and a prospective advertiser. The Department claimed that the tape revealed a failure by Telco to comply with the disclosure requirements under the charitable solicitation laws in Virginia. A subsequent investigation of the tape by Telco revealed that a competitor of Telco's in Virginia supplied the recording to the Department and the tape's authenticity could not be verified.

6. Following the Department's receipt of the tape recording, a campaign was then commenced by the Department to harass and intimidate the telephone solicitors and Telco's clients. For example, investigators from the Department entered the premises of the telephone solicitors without notice and demanded that documents and information be supplied immediately. The Department communicated with clients of Telco on repeated occasions seeking information as to the advertising solicitation and interfered with the relationship that Telco has established with its clients. The Department also communicated with the managers of the telephone solicitors and threatened the managers with civil and criminal penalties for any non-compliance with the charitable solicitation laws.

7. In response to the action of the Department, counsel for Telco requested a meeting with representatives of the Department to discuss their jurisdiction in view of the fact that Telco had not contracted with charitable organizations or made any charitable appeal for funds. Telco also asked for an opportunity to discuss the enforceability of the charitable solicitation laws in view of recent decisions of the United States Supreme Court. After repeated requests for such a meeting, the Department finally acceded to the request and a meeting was held in

early July of 1988. See Exhibit "1" annexed hereto.

8. At no time prior to or during the meeting was Telco informed that the meeting was being held pursuant to the provisions of the Virginia Administrative Process Act. Indeed, no notice has been received by Telco as of this date of any administrative proceedings, under the Administrative Process Act or otherwise. It has expressly agreed during the meeting that the discussions would be considered "settlement negotiations" and would not be used as evidence or admissions.

9. Telco and the Department discussed the constitutionality of certain provisions of the charitable solicitation law during the meeting and also discussed whether or not the sale of advertising by independent telephone solicitors on behalf of organizations that benefit only their members subjected Telco, the publisher, to the charitable solicitation laws. The Department maintained that Telco was subject to those laws and that the disclosure requirements remained in effect notwithstanding the recent Supreme Court ruling that invalidated substantially all mandated disclosures by professional fund raisers. Since the Department was threatening to enforce the charitable solicitation laws, Telco then commenced this action for a judicial determination of the constitutional issue and the scope of the charitable solicitation laws.

Signed under the penalties of perjury this ____ day of August, 1988.

s/

MARK D. HAYES
Telco Communications, Inc.

Subscribed and sworn to before me this ____ day of August, 1988.

s/

NOTARY PUBLIC
My Commission Expires:

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

TELCO COMMUNICATIONS, INC.
Plaintiff,

v.

S. MASON CARBAUGH, as he is
Commissioner of the Department
of Agriculture and Consumer Services
of the Commonwealth of Virginia,
Defendant.

**CIVIL ACTION
NO. 88-0471-R**

ORDER

The Court is in receipt of defendant's motion for summary judgment and supporting memorandum, plaintiff's memorandum in opposition, and defendant's rebuttal memorandum. Deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED as follows:

1. Defendant must, within fifteen (15) days of this date, notify the Court whether the Office of Consumer Affairs has initiated a formal hearing under the Virginia Administrative Process Act, Va. Code s 9-6.14:12 (1985 & 1988 Supp.) for the revocation or suspension of plaintiff's registration.

2. Hearing on the motion for summary judgment, previously scheduled for September 26, 1988 at 1:00 p.m. will be continued until further order of the Court.

Let the Clerk send a copy of this order to all counsel of record.

s/

UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

TELCO COMMUNICATIONS, INC.,
Plaintiff,

v.

S. MASON CARBAUGH, as he is
Commissioner of the Department of
Agriculture and Consumer Services
of the Commonwealth of Virginia,
Defendant.

**CIVIL ACTION
NO. 88-0471-R**

DEFENDANT'S RESPONSE TO COURT'S ORDER

NOW COMES defendant S. Mason Carbaugh, by counsel, and in response to this Court's Order of September 15, 1988, submits the following:

1. By its Order of September 15, 1988, this Court ordered defendant to notify the Court "whether the Office of Consumer Affairs has initiated a formal hearing under the Virginia Administrative Process Act, Va. Code s 9-6.14:12 (1985 & 1988 Supp.), for the revocation or suspension of plaintiff's registration."

2. Defendant, by affidavit of Larry Roberts dated August 8, 1988, attached to his motion for summary judgment, stated, in part, the following:

a. Following an initial investigation of complaints against TELCO, an informal conference was scheduled pursuant to the Administration Process Act between the Office of Consumer Affairs, TELCO and their respective counsel. The conference was held on July 6, 1988.

b. Following that meeting, the Office of Consumer Affairs requested further documents from TELCO. The next step would have been for the Office of Consumer Affairs to serve notice upon TELCO for a formal administrative hearing under the APA.

c. At that point, TELCO filed suit and defendant did not initiate any formal administrative hearing because of that filing. Defendant has not taken any further action to initiate a formal hearing and has no present plans to do so until this litigation has been completed.

WHEREFORE, having responded to this Court's order, defendant renews its request that its motion for summary judgment seeking abstention from this Court be granted because of the pendency of proceedings under the Virginia Administrative Process Act.

Respectfully submitted,

S. MASON CARBAUGH

By: _____ s/

Mary Sue Terry
Attorney General of Virginia

Gail Starling Marshall
Deputy Attorney General

Guy W. Horsley, Jr.
Senior Assistant Attorney General

Edward P. Nolde
James P. Wheeler
Assistant Attorneys General

R.App.12

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